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VIA FAX AND DELIVERY

Rosemary C. Smith Acting Associate General Counsel Federal Election Commission 999 E Street, NW Washington, DC 20463

Comment on \$ 40R 2002-13 &

RE: Advisory Opinion Request 2002-13

Dear Ms. Smith:

These comments are submitted on behalf of The Campaign and Media Legal Center, a nonpartisan organization which seeks to represent the public interest in legal and governmental proceedings involving federal campaign finance laws. They address the Advisory Opinion Request submitted by the Democratic Senatorial Campaign Committee, the Democratic Congressional Campaign Committee, the National Republican Senatorial Committee, and the National Republican Congressional Committee concerning the permissible manner of raising and spending money for an election recount under the Bipartisan Campaign Reform Act of 2002 (Advisory Opinion Request 2002-13).

As acknowledged by the national party committees submitting this Advisory Opinion request, the Bipartisan Campaign Reform Act of 2002 (BCRA) will generally be in effect during any recount resulting from an election held on November 5, 2002. To examine and clarify the precise nature of BCRA's impact on party and federal candidate fundraising and spending activities in relation to election recounts for federal elections, the committees have presented a number of questions and proposals to the Commission.

This comment responds to party committees' questions in turn and respectfully offers our views of the requirements of federal campaign finance law in this area. In general, as the Commission considers this first request for an Advisory Opinion regarding the requirements of BCRA, we urge it to be mindful of the fundamental purposes of the new law: to break the link between large donations and parties and individual candidates, and thereby help restore confidence in the federal political system. Along these lines, the Commission should recognize that its analysis with respect to this Advisory Opinion has the potential to reinforce the new law or, alternatively, to set the Commission on the track to the reintroduction of soft money in federal elections. In this regard, the Commission should accordingly take care not to open immediately evident loopholes or lay a foundation for future erosion of the new campaign finance law, as an earlier Commission did with Advisory Opinion 1978-10.

Analysis

Threshold Issue Raised in Party Committees' Letter

The party committees' analyses of certain issues in their Advisory Opinion request stem from a notion that recounts can be separated from federal elections. In support of this proposition, they cite an Explanation and Justification adopted by the Commission in 1977 which stated that recounts, "though they are related to elections, are not Federal elections as defined by the Act." See Explanation and Justification of the Disclosure Regulations, H.R. Doc No. 95-44, at 40.

We strongly disagree with the notion that a recount can be severed from the election. Indeed, where a recount is properly invoked, its completion is necessary for an election to become final. The November 6^{th} comments of the Chair of the Democratic Senatorial Campaign Committee reflect the idea that recounts fall within the rubric of federal elections:

"I understand this morning that Tim Johnson has pulled ahead of John Thune in South Dakota. With all precincts reporting, Johnson has the lead by more than 500 votes. State law allows for a recount, and we are preparing for that process. At the end of the day, I'm certain that Tim Johnson will be the winner."

(http://www.dscc.org/newsroom/inthenews110602y/).

The Chair does not appear to consider the election to be a separate function or entity from the recount, completed prior to the recount. Instead, the statement embodies a practical understanding that what occurs on Election Day and any subsequent recount are thoroughly integrated.

Although the Commission's Explanation and Justification language cited above draws some sort of an artificial distinction between the election and a recount, it at least appears to recognize the obvious fact that recount activity is in connection with federal elections. The language expressly states that recounts "are related to elections." (emphasis added).

Indeed, an understanding on the Commission's part that recounts and activities related to recounts are in connection with federal elections appears to be embodied in the corresponding regulation. This part of the 1977 Explanation and Justification discussed regulations (first codified at 11 CFR 100.4(b)(15) and 100.7(b)(17) and now appearing in slightly amended form at 11 CFR 100.91 and 11 CFR 100.151) excluding gifts, loans, advances, purchases or payments "made with respect to a recount of the results of a Federal election" from the definitions of "contribution" or "expenditure," except that the

prohibitions on contributions and expenditures by corporations, unions, national banks, and foreign nationals apply. As explained in subsequent Advisory Opinions, this regulation permitted the establishment of separate accounts or entities for federal election recount purposes, which could accept and use unlimited contributions from individuals and federal PACs but not accept and use contributions from corporations, unions, national banks, or foreign nationals. See Advisory Opinion 1978-92; Advisory Opinion 1998-26.

This regulation appears to be based on the statutory provisions addressing contributions and expenditures by corporations, unions, and foreign nationals, which specifically use an "in connection with" federal elections formulation. 2 U.S.C. 441b expressly states that "It is unlawful for . . . any corporation whatsoever, or any labor organization, to make a contribution in connection with any [federal] election." (emphasis added). Likewise, 2 U.S.C. 441e expressly bans foreign nationals from making "a contribution or donation of money or other thing of value . . . in connection with a Federal, State or local election." (emphasis added). In light of this statutory language, application of the ban on corporate, labor, and foreign national contributions with respect to the financing of recount efforts may reflect a longstanding belief on the part of the Commission that recount and recount-related activity were "in connection" with federal elections (and thus properly and fully subject to 2 U.S.C. 441b and 441e).

In sum, the previous application of fundamental aspects of federal campaign finance law – namely, the prohibitions on corporate, labor, and foreign national contributions in connection with federal elections – to the use and receipt of funds for recount purposes underscores the conclusion that recounts are at least in connection with federal elections.

1. Operation of Transition Rules/State and Local Party Committee Recount Efforts

In their first question posed to the Commission, the party committees "wish to confirm that":

- through November 5, 2002, national, state and local party committees may raise "recount funds" into separate accounts to be used to support recount efforts;
- after November 5th, national party committees may use these "recount funds" to pay expenses, retire debts, or pay for obligations incurred in connection with a recount resulting from any election taking place before November 6, 2002; and
- after November 5th, state and local party committees may spend "recount funds" in support of the recount efforts of a federal candidate.

Through November 5, 2002, national, state and local party committees could have raised "recount funds" (again, funds from individuals and federal PACs that may exceed the applicable contribution limits, but not from federally prohibited sources such as unions, corporations, foreign nationals, and national banks) into separate accounts. BCRA's

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restrictions on the solicitation or receipt of certain funds did not take effect until November 6, 2002. See BCRA, Secs. 402(a)(1), (b)(1).

Likewise, after November 5, 2002, a national party committee may use previously raised "recount funds" to pay expenses, retire debts, or pay for obligations incurred in connection with any recount resulting from an election held prior to November 6th, though only until January 1, 2003. This is provided for in the transition provisions of Section 402(b)(2)(B) of BCRA and 11 CFR 300.12. However, after November 5, 2002, national party committees may not receive or solicit any funds that do not comply with the source prohibitions, amount limitations, and reporting requirements of federal campaign finance law. Moreover, national party committees must use hard money to finance the payment of expenses relating to any recount resulting from an election held after November 5, 2002.

The party committees contend that state and local party committees may use non-federal funds, including recount funds, with regard to a federal election recount effort after November 5th on the grounds that (1) such activity does not fall within the definition of "Federal election activity," and (2) even if such recount efforts do constitute "Federal election activity," BCRA's restrictions relating to state and local party committee financing of "Federal election activity" do not apply with respect to recounts resulting from pre-November 6th elections.

Whether or not the state or local party committee spending with regard to a recount effort falls within the definition of "Federal election activity" depends on the particular recount-related activities financed. While a number of activities financed by state or local parties as part of a recount effort surely will not constitute "Federal election activity," it would not be appropriate for the Commission to issue a blanket ruling indicating that all activities that are part of recount efforts are not "Federal election activity." The party committees should specify all anticipated state and local party recount effort activities, and the Commission can then supply the required guidance.

¹ The indented portion of question #1 of the party committees' Advisory Opinion request discusses the prospect of national party committees' using "recount funds" to pay expenses incurred in connection with a recount resulting from any election occurring before November 6, 2002. However, the party letter later expresses a desire to confirm that "a national party committee may spend nonfederal money - including recount funds - it raised before November 6, 2002" to pay expenses in connection with recounts for pre-November 6th elections. (emphasis added). While a national party may, under BCRA's transition provision, spend "recount funds" on recounts arising from pre-November 6th elections (through December 31, 2002), it may not spend left-over funds from federally prohibited sources such as corporations, unions, and foreign nationals. Section 402(b)(2)(B)(ii) of BCRA makes it clear that national party committees may not use non-federal funds for any "expenditure" or for "renring outstanding debts or obligations that were incurred for such an expenditure." Receipts or spending with respect to federal election recounts are exempt from the definitions of "contribution" and "expenditure" only insofar as they do not involve funds from federally prohibited sources. Generally, this BCRA clause manifests clear congressional intent and understanding that the transition provisions governing the spending of left-over non-federal funds by national party committees do not in any way broaden the pre-BCRA permissible uses of non-federal funds or authorize the use of any type of non-federal funds for an activity for which, even pre-BCRA, such funding was prohibited.

Notably, in its letter of October 22, 2002, following up on the party committees' initial correspondence on this matter, the Commission asked the party committees to "[i]dentify the nature of the specific expenses [they] anticipate incurring with respect to the recounts." (emphasis added). On October 30th, the parties answered: "expenses traditionally associated with the undertaking of a recount effort... includ[ing], but not limited to: legal fees and expenses, fees for the payment of staff, expenses for administrative overhead and office equipment, and any other expenses that may arise in connection with a particular recount effort." (emphasis added). The party committees' answer in this respect lacks sufficient specificity for the Commission to conclude that the anticipated state and local party committee recount efforts involve no "Federal election activity."

Even if certain aspects of state and local party committee recount efforts resulting from elections held prior to November 6, 2002 constitute "Federal election activity," they will not be subject to the financing restrictions of 2 U.S.C. 441i(b). Section 402(a)(4) of BCRA provides that 2 U.S.C. 441i(b) "shall not apply with respect to . . . recounts . . . resulting from elections held prior to such date." Thus, with respect to recounts arising out of elections held prior to November 6, 2002 only, state and local party committee recount activity will not be subject to 2 U.S.C. 441i(b). However, state and local party committee recount efforts arising out of elections held after November 5, 2002 are not exempt from 2 U.S.C. 441i(b).

Apart from the potential applicability of 2 U.S.C. 441i(b), there are broader questions about whether state and local party committees should – for recount efforts related to future elections – be able to continue to use even "recount funds" to finance such activity.

Recount efforts are patently undertaken and understood to influence the final outcome of federal elections. While the Commission's regulations excluding the use and receipt of funds with respect to federal election recounts from the definitions of "contribution" and "expenditure" appear to at least embody the idea that recounts are in connection with federal elections (as they ban the use and receipt of corporate, labor and foreign national funds for these purposes), it incorrectly allows the use and receipt of unlimited contributions from individuals and federal PACs for these purposes. To remedy this problem, we urge the Commission to undertake a rulemaking to delete this exception and accordingly make it clear that all amounts donated and used for recounts with respect to federal elections are subject to the amount limitations, source prohibitions, and reporting requirements of federal campaign finance law (i.e., hard money subject to all the contribution limits).

If such a rule were adopted, state and local party committee recount efforts with respect to federal elections occurring after November 5, 2002 would have to be financed exclusively with hard money. Notably, recount efforts concerning elections involving federal candidates have no relation to non-federal elections. At a minimum, however, state and local party committees should in no circumstances be permitted to use corporate, labor, or foreign national funds to finance these recount efforts.

2. Separate Entities Established by State and Local Parties After November 5, 2002

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The party committees inquire whether state and local party committees may, after November 5, 2002, establish separate entities that may raise and spend "recount funds" in support of a federal candidate's recount efforts arising from elections taking place before November 6^{th} . This reflects their understanding of what is permitted by the law.

The provisions of 2 U.S.C. 441i(b) also apply to any entity that is established by a state or local party committee. However, as indicated above, Section 402(a)(4) of BCRA provides that 2 U.S.C. 441i(b) "shall not apply with respect to . . . recounts . . . resulting from elections held prior to" November 6, 2002. With respect to recounts resulting from elections occurring after November 5, 2002, these entities operate subject to 2 U.S.C. 441i(b). More generally, they should be required to use exclusively hard money to finance such recount efforts, just as state or local party committees should be subject to such a requirement (see discussion in (1) of need for a rulemaking). At a minimum, they should in no circumstances be permitted to use corporate, labor, or foreign national funds to finance recount efforts.

3. Separate Organizations Established by Federal Candidates After November 5, 2002

The party committees suggest that federal candidates may, subject to the rules of the U.S. House of Representatives and U.S. Senate, establish a separate organization or entity after November 5, 2002 that may raise and spend "recount funds" (in the same way as under pre-BCRA law).

We strongly disagree with their analysis of federal campaign finance law in this instance. 2 U.S.C. 441i(e)(1) prohibits federal officeholders, federal candidates and their agents from soliciting, receiving, directing, transferring, or spending funds "in connection with an election for Federal office, including funds for any Federal election activity," unless the funds are subject to the amount limitations, source prohibitions, and reporting requirements of federal campaign finance law (i.e., hard money subject to all the contribution limits). The same prohibition applies to any entity "directly or indirectly established, financed, maintained or controlled by or acting on behalf of" a federal candidate.

The parties conclude that these restrictions do not apply with respect to the solicitation, receipt and spending of funds for or by a separate entity established by a federal candidate for recount purposes, because recounts are allegedly not "elections" – and thus activities relating to federal election recounts are allegedly not "in connection with" a federal election. However, the idea that recounts are distinct and severable from the election defies common sense and common understanding. Moreover, as elaborated on above, the longstanding ban on the receipt and use of corporate, labor, national bank and foreign national funds for recounts underscores the idea that recounts and recount-related activity are in connection with federal elections – particularly given that the corporate, labor and foreign national contribution and expenditure prohibitions in federal campaign

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finance law use the terms, "in connection with . . . [Federal] elections." See 2 U.S.C. 441b; 2 U.S.C. 441e.

Notably, neither Advisory Opinion cited by the party committees in their October 17, 2002 letter dismisses the idea that recounts and recount-related activity are in connection with federal elections, or employs the parties' formalistic analysis of that particular matter. These Advisory Opinions were based solely on the regulations carving out funds used or received "with respect to the recount of the results of a Federal election" from the definitions of "contribution" or "expenditure" (which we have noted also ban the use of corporate, labor and foreign national funds with respect to such recounts). Indeed, as the Commission explained in a separate Advisory Opinion, "[Advisory Opinion] 1978-92 was premised . . . on specific provisions of the Commission regulations exempting payments for recounts from the definition of contribution or expenditure, but prohibiting payments from sources prohibited under Part 114." See Advisory Opinion 1990-23.

Thus, BCRA prohibits federal candidates from establishing a separate organization or entity that may raise and spend "recount funds." Of course, this does not mean that federal candidates may not finance recount efforts. They may spend hard money contributions (subject to the full contribution limits) to their principal campaign committees on such efforts.

Contrary to the party committees' suggestion, applying BCRA's restrictions on federal candidates and on entities such candidates directly or indirectly establish or control to solicitations, receipts, and spending with respect to recounts resulting from pre-November 6th elections is required. Section 402 of BCRA very clearly specified which of the Act's restrictions would not take effect on November 6, 2002. Indeed, it expressly waived the applicability of certain restrictions to aspects of national, state and local party committee activity with respect to recounts resulting from elections held prior to November 6, 2002. The statute, however, did not provide any such delay or waiver with respect to the provisions of 2 U.S.C. 441i(e)(1). By the clear language of the statute, the restrictions of that provision take full effect on November 6, 2002.

4. Separate Organizations Established by Federal Candidates Before November 5, 2002

The parties believe that federal candidates may establish a separate entity before November 5, 2002 for the raising and spending of "recount funds" and exercise direction or control over this entity after November 5, 2002.

For all the reasons expressed above, this is not possible. An entity "directly or indirectly established, financed, maintained or controlled by or acting on behalf of" a federal candidate is subject to the restrictions of 2 U.S.C. 441i(e)(1) (which, as explained in (3),

² The provision permitting general solicitations of funds by individual federal candidates for certain 501(c) organizations does not alter this conclusion. Among other things, 11 CFR 300.52 provides that such general solicitations are only permissible if "the organization's principal purpose is not to conduct election activities" and "the solicitation is not to obtain funds for activities in connection with an election." For the reasons described above, neither condition could be met in this instance.

prohibit both from soliciting, receiving or spending any funds other than hard money for federal election recounts). Even under the Commission's unfounded "grandfather clause" (see 11 CFR 300.2(c)(3)), the "control" or "direction" over the entity by the federal candidate following November 6th would trigger coverage of the entity under 2 U.S.C. 441i(e)(1). Moreover, in addition to the restrictions applicable to the "separate" entity, under 2 U.S.C. 441i(e)(1), a federal candidate or officeholder and his or her agents may not themselves solicit, receive, direct, transfer or spend non-federal funds in connection with federal elections. This further precludes the structure envisioned by the party committees.

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As indicated in (3) above, however, a federal candidate may finance recount efforts from hard money funds contributed to his or her principal campaign committee. In this respect, a federal candidate may certainly exercise control or direction over funds spent on his or her own recount effort.

5. Separate Organizations Established by National Parties Before November 5, 2002

While the nature of this question is unclear, the party committees appear to desire that any separate entities that they or federal candidates establish prior to the effective date of BCRA for the raising and spending of "recount funds" be permitted to continue, after BCRA's effective date, to raise funds in increments exceeding contribution limits, so long as the funds are donated by federally permissible sources.

As indicated earlier, we believe that, under a proper interpretation of BCRA, all such entities established by a national party committee even prior to November 6, 2002 would be subject to the basic prohibition on any solicitation, receipt, transfer, or spending of funds that do not comply with the amount limitations, source prohibitions, and reporting requirements of the Act (i.e., hard money). See 2 U.S.C. 441i(a)(1)&(2). Thus, like a national party committee, those entities could not raise funds after November 5th from federally permissible sources in amounts exceeding the contribution limits. Likewise, the recount-related activities of all such entities established by a state or local party committee even prior to November 6, 2002 would be subject to 2 U.S.C. 441i(b) (with respect to future elections). And, for the reasons discussed in (3) above, all such entities established by a federal candidate even prior to November 6, 2002 could not solicit, receive, or spend funds that do not comply with the amount limitations, source prohibitions, and reporting requirements of the Act. See 2 U.S.C. 441i(e). We strongly disagree with the Commission's adoption of an unfounded "grandfather clause" which requires the agency willfully to blind itself to the full nature of the ties between parties and individual candidates and other entities.

Even under the Commission's "grandfather clause," however, we note that any provision of funds to the "separate" entity by a party committee or candidate prior to November 6, 2002 that are not spent down entirely by that date *could* be considered by the agency for purposes of determining whether that entity should be covered by the same rules to which BCRA subjects the parties and candidates. Moreover, as discussed in (4), even after November 5th, the continuing involvement of party committees and candidates with the

previously established "separate" entities for raising and spending "recount funds" (a highly likely result, given the function of the organization) could very well translate to financing, maintenance, or control of the entity and thus trigger the restrictions on the solicitation, receipt and spending of certain funds provided for in BCRA. Along those lines (and as also mentioned in (4)), apart from the question of whether an entity is "directly or indirectly established, financed, maintained or controlled" by a party or federal candidate, party committees and candidates are themselves subject to restrictions on the solicitation, direction and spending of non-federal funds under BCRA that stand inevitably to come into play when supposedly "separate" entities involve themselves in federal election recounts.

Furthermore, as indicated earlier in these comments, we believe that the Commission should undertake a rulemaking to delete the exception from the definitions of "contribution" and "expenditure" for "recount funds" and accordingly make it clear that all amounts donated and used for recounts with respect to federal elections are subject to the amount limitations, source prohibitions, and reporting requirements of federal campaign finance law (i.e., hard money subject to all the contribution limits). This would prohibit the entities contemplated in this question by the party committees from raising or spending any non-federal funds for recount purposes. In any event, at a minimum, the receipts and disbursements of such entities must not constitute corporate, labor, national bank, or foreign national funds.

Thank you for your consideration of these comments. We hope that they are of assistance to the Commission in responding to this Advisory Opinion request.

Sincerely,

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